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CURRENT TOPICS.

The tone of the lay press in speaking of the law and the lawyers, is generally so recklessly and indiscriminately fault-finding, that the following views from our enterprising Kansas contemporary, "*The Commonwealth*," *a propos* of the responsibility of lawyers in the general assembly for improvident and illegal legislation, is really refreshing. "It is not the fault of the lawyers in the legislature that so many unconstitutional laws are passed. Almost invariably such acts become laws in the face of protests from lawyers. * * * At every session there have been a lot of members who thought to make themselves popular by denouncing lawyers. Every measure proposed by a lawyer would be opposed by these wiseacres. They would try to make the people believe that lawyers were always trying to get some measure through to rob the people. The result has been, and always will be, that crude, unwise laws have been passed. We mean, always will be till the people send men to the legislature, who either know something themselves, or know enough to know that they don't know anything, and will follow the advice of those who do know something."

Although the bar can not be saddled with blame for the fact, it is unquestionably true that there is a great deal of unnecessary blundering in the framing of legislation, which entails an infinity of vexation, expense and inconvenience upon the public, and not unfrequently results in the invalidity of the law itself. This subject was recently under discussion before the American Social Science Association during its session at Saratoga. In the course of his annual address, the president, Professor Wayland, of the Yale Law School, after referring to the methods of the English Parliament for avoiding this evil, by the employment of experienced draftsmen to supervise the manner and language of the government bills, makes the suggestion that in many of the States, a permanent non-partisan committee, composed of eminent lawyers, would be found extremely useful in correcting some of the crudities which so commonly disfigure our statute book. The suggestion is a good one, and should receive practical attention from lawyers who are also legislators. As they are likely to receive no inconsiderable share of the blame for clumsy and blundering legislation, and suffer more annoyance than any other class of the community in consequence of it, they might as well make extra effort to prevent the evils in question.

LATENT DEFECTS IN GOODS SOLD.

Where, after a sale of goods, a defect appears of which neither party were aware at the time of the sale, and which they could not then have discovered without damaging the goods, a somewhat difficult question as to their respective rights arises. But, when we desire to examine any such sale, we must, in the first place, before considering whether any defect was latent or patent, see what was the exact contract entered into by the parties, and decide whether it has been fulfilled; for if the seller has not fulfilled his contract, the case is at an end, and no further inquiry will be needed.

Our next step will be to inquire whether the seller gave any express warranty, or there is anything in the transaction from which the law will imply a warranty, or whether, on the other hand, the goods were sold "with all faults." And, although, in many cases, it is by no means easy to determine these points, we shall generally find, where difficulties arise, that their solution depends on the amount of reliance placed by the buyer in the skill and judgment of the seller.

If we can discover anything said or done before the completion of the contract, which amounts to an express warranty, the seller will be responsible for any defects which prevent the article answering to the terms of the warranty, but his liability will not extend beyond those terms; for "we can not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for."[1]

[1] Dickson v. Jizinia, 10 C. B. 602, 610; Budd v. Fairmaner, 8 Bing. 48, 51; Baldwin v. Van Deusen, 37 N. Y. 487.

In an action arising out of the sale of a note made by O, it was found by the referee that the plaintiff, upon the sale, agreed that the note was the genuine note of O, and not further or otherwise. O was an infant, and hence the note may be said to have had a latent defect; but the fact was not known to either party. On this finding it was held that no warranty could be implied that O was an adult, even if the words "not further or otherwise," were struck out.[2] On the other hand, an express agreement that provisions shall pass an inspecting officer, does not prevent the additional implied condition that they are fit for the purpose for which they are required.[3]

If there is no express warranty, we return to the preliminary inquiry, whether the contract has been fulfilled; whether the article delivered answers the description in such a contract? Where a man said, "send me your patent furnace to fit up my brewing copper," and the furnace was sent, but did not suit the copper; it was held that the seller had performed the contract; for the buyer had ordered a definite article, and, though he had stated the purpose for which it was wanted, the form of his order showed that he relied on his own judgment as to whether it would suit him.[4] But where on a sale by sample the article sold was described as rape oil, but was in reality rape oil adulterated with hemp oil, the seller was held responsible, even though the bulk agreed with the sample, and in the opinion of the jury, the purchaser well knew what he was buying.[5] And in Josling v. Kingsford,[6] the decision was the same on its being shown that an article sold as oxalic acid was not oxalic acid, though the seller had disclaimed all responsibility as to quality, and at his suggestion the buyer had inspected the article. Where, however, a man bought pigs which he subsequently found had typhoid fever, and it was argued that the contract was for pigs, but that what was delivered was not pigs, but masses of typhoid fever, the House of Lords solemnly decided that a pig with typhoid fever is a pig.[7] But, beyond this general rule that the goods sold must be of the kind bargained for, the law will imply that where a man sells an article generally, he thereby warrants that it is merchantable, that it is fit for some purpose;[8] and where he sells it for a particular purpose, he thereby warrants it fit for that purpose.[9] In Jones v. Bright, the defendants were manufacturers of copper. They were introduced to the plaintiffs by a mutual acquaintance, Fisher, with the remark, "Mr. Jones is in want of copper sheathing for a vessel;" upon which the defendant said, "we will supply him well." Under this contract copper was supplied which proved defective through some intrinsic latent defect in the quality of the copper, and it was held that the defendants were liable on an express warranty that the copper which was sold for a particular purpose was fit for that purpose. Brown v. Edgington,[10] was a similar case, though perhaps the facts were somewhat stronger against the seller. In Randall v. Newson,[11] the defendant, a carriage maker, put a pole in the plaintiff's carriage which broke and caused damage, owing to a latent defect in the wood, for which he was held liable. The principle underlying this and the other cases to which we are about to refer, appears to be that where the buyer trusted in the judgment of the seller, the latter is liable for all defects whether latent, patent, or discoverable. "If" says Tindal, C. J., "a party purchases an article upon his own judgment, he can not afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."[12] "When a person desirous to obtain an article for a particular purpose, but, not being himself skilled in respect to

[2] Baldwin v. Van Deusen, 37 N. Y. 487.
[3] Bigge v. Parkinson, 7 H. & N. 955.
[4] Chanter v. Hopkins, 4 M. & W. 402; Dounce v. Dow, 64 N. Y. 411; Osborne v. Hart, 23 L. T. 851; Ollivant v. Bayley, 5 Q. B. 288; Archdale v. Moore, 19 Ill. 565; Whitmore v. South Boston Iron Co., 2 Allen, 58.
[5] Nichol v. Godts, 10 C. B. 191.
[6] 13 C. B. (N. S.) 447.
[7] Ward v. Hobbs, L. R. 4 App. Cas. 24.
[8] Laing v. Fidgeon, 6 Taunton, 108; 4 Camp. 169. The rule applies, however low the price.
[9] Jones v. Bright, 5 Bing. 544.
[10] 2 Man. & Gr. 279.
[11] 2 Q. B. D. 102.
[12] Brown v. Edgington, 2 Man. & Gr. 279.

such articles, applies to one professing to be acquainted with the subject, or who, by his occupation, holds himself out to the world as understanding it, and the latter furnishes what he alleges to be suitable, it is plainly to be inferred that both parties understand the purchase to be made upon the judgment and responsibility of the seller."[13] In Jones v. Bright, the rule is carefully limited to products of art, though Best, C. J., points out that the decisions in the case of horses turn on the same principle. And in Hoe v. Sanborn, the rule is laid down, "that the vendor is liable for a latent defect arising from the manner in which the article was manufactured, but not for any latent defect in the material which he is not shown, and can not be presumed to have known." In both cases the court seems to have feared encroaching on the decision in Parkenson v. Lee;[14] but all that is there decided is, that where goods are sold by sample, there will not be, in addition to an express warranty that the bulk is like the sample, an implied warranty against a latent defect in both the sample and the bulk of which both parties were equally able to judge; and it has since been said of that case, that either it does not determine the extent of the seller's liability on the contract, or it has been overruled.[15] Hence the above rule in Hoe v. Sanborn must, we think, be considered too restricted; indeed, it is by no means easy to fix any definite limit to the liability of a vendor for latent defects, since it depends to so great a degree on the varied facts of each case.

We have seen that the rule of Jones v. Bright is not confined to defects in products of art, but may become applicable, as in Randall v. Newson, to a pole of wood; and, though Jones v. Bright applies to a sale of manufactured goods by the manufacturer himself, the courts would, probably, not hesitate to extend the rules laid down there to sales by other persons, if it appeared that confidence had been placed by the buyer in the seller, and the latter had accepted the responsibility.[16] In Gray v. Cose,[17] the facts were very like those in Jones v. Bright; the article was described as "copper sheathing," but the sellers were not the manufacturers. It was held that the law would not imply a general and unqualified promise that the goods should be good, sound, substantial and serviceable; but Lord Tenterden was inclined to think "that, in point of law, if a person sold a commodity for a specific purpose, and with knowledge at the time of the sale that it was to be applied to that purpose, he must be understood to warrant that the commodity so sold should be reasonably fit and proper for the purpose for which it was sold." And, though the other judges did not concur in this opinion, it was apparently approved by the Court of Appeal in Randall v. Newson, where Brett, L. S., remarks, "it is obvious that Lord Tenterden did not consider the seller relieved by reason of the defect being latent." The case of Bluett v. Osborne[18] arose out of the sale of a bowsprit for a ship, which turned out to be useless through a latent defect in the wood; and Lord Ellenborough decided in favor of the seller, but on what ground is not very clear, unless, as Maule, J., suggested, he treated it as a sale of a specific bowsprit, and therefore under the rules applying to a sale of a given article.[19] However that may be, Lord Ellenborough lays down the general rule that he who sells, impliedly warrants that a thing sold should answer the purpose for which it is sold. In Burnaby v. Bollett,[20] the defendant bought a dead pig which was exposed for sale at a butcher's shop, and resold it to the plaintiff, without taking it away. Neither the plaintiff nor defendant were butchers by trade, or had any knowledge that the pig was unsound, though it afterwards turned out to be unfit for human food. Under these circumstances, it was held that the defendant was not liable. He was not dealing in the way of a common trade, or the question, as we shall see, might have been somewhat different. In Emmerson v. Matthews,[21] it was held that where a meat salesman, who is not a dealer in meat, but merely sells on commission, offers for sale a carcass with a defect of which he is not only ignorant, but has not any means of knowl-

[13] Hoe v. Sanborn, 21 N. Y. 552, and see also Bartlett v. Hopport, 34 N. Y. 118.
[14] 2 East, 314.
[15] Randall v. Newson, 2 Q. B. D. 106.
[16] See the remarks of Tindal, C. J., in Brown v. Edgington, 2 Man. & Gr. 279.
[17] 6 D. & Ry. 200.
[18] 1 Stark. N. P. 284.
[19] 2 Man. & Gr. 286.
[20] 16 M. & W. 644.
[21] 7 H. & N. 586.

edge, the defect being latent, he is not liable to any penalty, and does not, as a matter of law, impliedly warrant that the carcass is fit for human food, and is not bound to refund the price, should it turn out not to be so. And in Smith v. Baker,[22] the court remarked that the law would be the same where the seller has no means of knowing of the defect on an ordinary outward inspection, though he might have discerned it by cutting into the meat. In all these cases the judgment seems to have turned on the fact that the buyer had quite as much opportunity of investigating the meat as the seller, the latter not being actually a dealer. One of the most recent cases on this part of the subject is Bragg v. Morrill.[23] There the plaintiff bought an iron shaft from the defendant, and employed him to turn it so that the plaintiff could attach pulleys at any point he chose. It turned out that there was a latent defect in the shaft, by which the plaintiff was damaged; but the court decided in the defendant's favor. There was no complaint that the defendant did not properly perform what work he did upon the shaft; therefore we may put part of the transaction, which was paid for separately, out of the question, and we then see at once that it comes within the decision in Burnaby v. Bollett;[24] for all the defendant did was to sell a shaft for the purpose of holding pulleys, without knowing their weight, or size, or the amount of work they were to do. The only point in which this case goes further than Burnaby v. Bollett is, that here the defendant was by trade a founder; but, on the other hand, the seller in that case knew the exact object for which the article was bought, whilst here he did not; and this fact also distinguishes the case from Randall v. Newson, where the seller not only knew the exact purpose for which the pole was wanted, but fitted it to the carriage himself.

It has been stated that an implied warranty is raised in the sale of provisions where they are sold for immediate use by dealers and common traders in provisions;[25] but the statement is combatted by Benjamin in his work on the sales of Personal Property;[26] and in Burnaby v. Bollett, decided by the Court of Exchequer in 1847, the conclusion deduced from the old cases and text-books is," that there is no other difference between the sale of victuals for food, and other articles, than this,—that victualers, butchers and other common dealers in victuals, are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances as they are, so that, if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article; but they are also liable to punishment for selling corrupt victuals, by virtue of an ancient statute, certainly if they do so knowingly, and probably if they do not, and are therefore responsible civilly to those customers to whom they sell such victuals, for any special or particular injury by the breach of the law which they thereby commit." Where an article is sold "with all faults," the question of latent defects scarcely arises; for such a stipulation throws upon the buyer the burden of examining all faults, both secret and apparent; and the seller will not be liable for any such defect, unless he was guilty of any fraud, either in making a false representation, or in using means to conceal some defect.[27] The celebrated case of Ward v. Hobbs[28] arose out of a sale of pigs, which turned out to have typhoid fever, and it was argued that, since it is a criminal offense knowingly to send animals affected with a contagious disease to a public market,[29] the mere sending was a representation that the pigs were not so affected. But the House of Lords decided that there was no such implied warranty, there being a perfectly clear written statement that the vendor will not warrant the goods, and that the goods must be taken with all faults, together with the fact that the goods were open to inspection. And Lord Chancellor Cairns further observed that in order to qualify this, there must be something as clear in statement in an opposite direction; thus, a verbal statement that the vendor believed the animals to be free from disease, might be foundation for an

[22] 40 L. T. 261.
[23] 49 Vt. 45; 24 Am. Rep. 102.
[24] 16 M. & W. 644.
[25] Story Sales of Per. Prop., § 3[illegible]; Chitty on Cont., 10th ed., p. 414n; Addison on Contracts, 7th ed., p. 495; Parsons on Contracts, 6th ed., p. 588.
[26] 2d ed., p. 549.
[27] Baylehole v. Walters, 3 Camp. 154; Schneider v. Heath, 3 Camp. 506; Mellish v. Motteaux, Peake, N. P. C. 115.
[28] L. R. 4 App. Ca. 13.
[29] 32 & 33 Vict., Cap. 70.

action of deceit, in which case we conclude that a *scienter* would have to be proved; but the question did not arise, for the statement of claim relied upon a warranty, but made no case of deceit or fraud or failure of consideration. The law as to latent defects relating to carriers[30] is somewhat different from that which applies to goods sold.[31]

Inner Temple. HORACE W. MONCKTON,

WHAT CONSTITUTES A HOUSEHOLDER.

The privilege of chattel exemption is, by the statutes of most States, granted to householders only. It is stated by Thompson, in his treatise on Exemptions, section 40, that the phraseology by which, in the statutes of various States, this privilege is conferred, is as follows: "Householder or head of a family;"[1] "head of a family;"[2] "householder, being the head of a family;"[3] "debtor who is the head of a family;"[4] "any resident householder;"[5] "head of a family;"[6] "housekeeper, or head of a family."[7]

Thus Mr. Thompson sets out the varying phraseology used in the statutes of twenty-two States; and in every case, the statutory phrase used imports that the debtor must be the head of a family. Some exceptions are given to this general statutory rule, and to its express or implied object. Examples of those exceptions are found in the statutes of Wisconsin and Minnesota when the privilege is extended to "any resident of the State.[8]

In respect to this privilege where it is extended only to a "householder or head of a family," it is all-important to ascertain with precision, what it is that constitutes such householder or head of a family. That the decisions on this point are hopelessly conflicting, is painfully obvious to whoever has in the least investigated the question. But while no general principle can be deduced by which this conflict can be reconciled, an inquiry into the cause of the confusion may throw some light upon the question itself, and supply a sound and rational principle of decision. The sources of the error—for error there must be on one side or the other—may be traced to the following causes: 1. In some of the cases no attention was given, so far as appears, to the reason and policy of the law. 2. In those States where the express or implied policy of the law is the protection of the debtor's family from want, the courts, in deciding the question, have sometimes followed decisions rendered in States where the privilege is not thus limited, without adverting to the difference between the statutes under which the cases arose. Thus it happens that in those States where the policy of these statutes is the same, we find courts occupying antagonistic positions on this question. Such a conflict is little less than a reproach to the law; for, *a priori*, there is no sound reason conceivable why the law should not be the same wherever the reason of it is the same.

In attempting to answer properly the question as to who is a householder or head of a family, it is indispensable that we should search out the policy of the law, viewing the question from an ethical and historical, as well as from a juridical standpoint; for the difficulty in deciding does not arise from the use of the terms "householder," "head of a family," but in determining what constitutes a family. Webster defines a householder to be "the master or chief of a family; one who keeps house with his family." The word householder, therefore, imports, *ex vi termini*, the head of a family; and these terms are thus used interchangeably.[9] The confusion arises in determining what constitutes a family, within the purview of the statute; and it is extremely curious to note the precise point where the conflict begins, illustrating, as it does, what may be called "a survival of historic ideas." Some courts adopt the definition of family which was current centuries ago, in a different state of society and in a foreign language; while others adopt the

[30] As explained in Redhead v. Midland Ry., L. R. 4 Q. B. 379.

[31] Randall v. Newson, 2 Q. B. D. at p. 110; and see the remark there as to Francis v. Cockrell, L. R. 5 Q. B. 501.

[1] Gould's Ark. Stat., ch. 61, sec. 29.

[2] Cal. Civil Code, sec. 1260.

[3] Gen. Laws, Col., sec. 1343.

[4] Code, Ga., 1873, sec. 2040.

[5] 2 Stat. Ind., 1876, p. 353, sec. 1.

[6] Code, Iowa, 1873, sec. 3072.

[7] Const. Va., 1867, art. 11, sec. 1; Code, Va., 1873, p. 1168, sec. 1.

[8] Thompson on Ex., sec. 41.

[9] Calhoun v. Williams, 32 Gratt. 18.

definition of family as it has been modified by the development and growth of society. Thus the Latin word, *familia*, signified "the whole of the slaves in a household, a household establishment, family servants, domestics." Thus Cicero, in his oration in behalf of Calcina, says: "We understand family to mean that which consists of several slaves, but that one man is not a family." Now the relation of master and servant is but an outgrowth of the ancient relation of master and slave—a relation softened and chastened by the influences of a higher civilization. Those courts, therefore, who hold that an unmarried man, with no one dependent on him for support, but having a domestic establishment of hired servants, is a householder, adopt the primitive and etymological meaning of the word. But the relation of master and servant arises solely out of contract, while the relation of master and slave grew out of *status*. The word *familia* signified a *status;* the power which the head of the family exercised over wife, children and slaves arose exclusively out of *status*, and not out of contract; so that there has been a transition in the meaning of the term "master and slave," into that of "master and and servant," as the relation now exists. If, therefore, the word "family" describes a *status*, it follows that the "servants" are not to be included in the consideration of the question, since their relation to the master is purely contractual. Webster, in defining the word, does not attempt to give a solution of the precise question. "The collective body of persons who live in one house and under one head or manager; a household including parents, children and servants, and, as the case may be, lodgers or boarders." It would be impossible to determine from these definitions whether "the collective body of persons," thus aggregated, should be connected together by contract, or by reason of their *status*, or be drawn together solely by the gregarious instinct. The definition is broad enough to embrace all of these conceptions. Yet it is clear that a mere gregarious union of miscellaneous persons would not satisfy the modern idea of the essential elements of a family. The word *familia*, and its derivative, family, have had their stages of growth and change like most other words "hoar with age." "Originally, *familia* signified the thralls of a master. Next, it denoted other domestic property in things as well as in persons. In a third sense, it applied to all the persons who could prove themselves to be descended from the same ancestor."[10]

But it is when we consider the historical origin of the word, and wherein it has assumed an important place in the laws and institutions of all countries, that light is thrown on the juridical meaning of the term. Thus Aristotle deduces the development of the city from the village, the village from the household, and the household from man's relation to woman, coupled with the possession of property. Thus the historian Freeman points out that "the Greek philosopher saw that the original element of the State—of the city—was to be found in the family."[11] "It is among the men of our blood that we can best trace out how, as in Greece and Italy, the family grew into the clan; how, as in Greece and Italy, the clan grew into the tribe; how, among the Teutons, on either side of the sea, the tribe has grown, not into the city, but into the nation."[12] Politically, the institution of the family has ever been considered as of unspeakable importance in its relation to the State; and, in ancient systems of jurisprudence, as well as in modern, a large mass of the laws was directed wholly to the protection of the family as such. "Ancient law knew next to nothing of individuals. It was concerned not with individuals, but with families."[13]

Such being the character of the family as the germ of the State, and such being its influence ultimately upon the character of the State, it would be difficult to exaggerrate the tremendous responsibility of judge and legislator in enacting and fashioning the laws in this behalf. It is only through the institution of the family that the State develops its own true and proper life. "All the essential institutions of the State can be decomposed into government, the family, property and contract. The inquiry into the historical and ethical origin of these institutions, has given rise to various schools of opinion, and, though an approximation to an agreement

[10] Encyclopedia Brit., Title, Family.
[11] Freeman's Comparative Politics, p. 101; Aristotle's Pol., I, 25.
[12] Freeman's Comp. Pol., p. 111.
[13] Maine's Anc. Law, p. 250.

may be more and more expected, still it is probable that room for great divergencies of thought will be presented to the end of time. Nevertheless all theories on the subject concur in the view of the extreme momentousness of each particular institution, and in appreciation of the indispensable place it holds in the progress of national life. Whatever place law occupies in the original foundation, or, as some say, the invention of these several institutions, it must be confessed that the functions performed by law, in making out and giving stability to them, are of the utmost importance."[14] "The primary object which the law has to keep in view, is the support of the integrity of these original groups, on the continued vitality of which the whole structure of society depends."[15] Thus the exemption laws are only one species of the class of laws whose object is to preserve the integrity of the family, to protect it from destitution and dissolution. It was not for the benefit of the slaves that this class of laws was enacted, because the slaves never formed an integral part of the Commonwealth; but it was for the purpose of keeping together, for social training and preparation, those members of the family whose characters are there fashioned and fitted to discharge their duties as citizens. And it is from this point of view that this class of laws regards the family as an institution, not resting merely in contract, but existing as a *status*, and as such having special rights and duties, different from and vastly superior to such rights and duties as arise out of civil contract merely, as in the case of master and servant. Nowhere has the true conception of the family been more clearly and accurately grasped and portrayed than by Hegel. "The family may be reckoned virtually as a single person, since its members have either mutually surrendered their individual personality (and consequently their legal position towards each other, with the rest of their particular interests and desires), as in the case of the parents; or have not yet attained such an independent personality, as in the case of children. They live, therefore, in a unity of feeling, love, confidence and faith in each other. And in a relation of mutual love, the one individual has the consciousness of himself in the consciousness of the other. He lives out of self, and in their mutual self-renunciation, each regains the life that had been virtually transferred to the other, gains, in fact, that other's and his own, as involved with that of the other. The farther interests connected with the necessities and external concerns of life, as well as the development that has to take place within their circle, that is, of the children, constitute a common object for the members of the family. The spirit of the family—the Penates—form one substantial being, as much as the spirit of a people in a State, and, in both cases, consists in a feeling, a consciousness and a will not limited to individual personality and interest, but embracing the common interests of the members generally. But this unity is, in the case of the family, essentially one of feeling. The piety of the family relation should be respected in the highest degree by the State. By its means the State obtains as its members individuals who are already moral (for as mere persons they are not), and who, in meeting to form a State, bring with them that sound basis of a political edifice—a capacity of feeling one with a whole."[16]

The essential features of a family are, therefore, unity, the merging of the personality of each into that of the family, self-renunciation, community of feeling and interest. Such is the ethical picture of the family, and which is all comprehended in the idea of it as a *status*. A jurist has drawn the same picture in the language of the law. Thompson points out as the distinguishing features of the family, "the legal or moral duty to support," "a condition of dependence," "a relation of *status*, and not of contract merely," "subsisting in common, directing their attention to a common object, the promotion of their mutual interests and social happiness."[17]

Thus sociologist and jurist concur in the analysis of the meaning of the term, and in delineating the conception of the idea. Kent says, "this relation of master and servant rests altogether on contract."[18] But it would be difficult to conceive of a right or duty, belonging or owing to any member of the

[14] Amos' Science f Law, pp. 42, 43.
[15] Ibid. p. 123.
[16] Hegel's Philos. of History (Bohn's Ed.) 44, 45.
[17] Thompson on Ex., secs. 44, 45, 46, 47.
[18] 2 Kent Com. 258.

family as such, which arises out of contract. Those peculiar rights and duties grow out of the *status*, the situation in which the members of the family stand to each other. The question thus arises—for this is the point of dispute—does the living together of the master and his hired servants constitute a family? Or is the question, as to what constitutes a householder, to be determined wholly independent of the use of hired servants? Are they within the spirit and policy of the exemption laws? Is it for their benefit that those laws, or the entire laws of that class, were made? Or were those laws intended solely for the benefit of the family, as portrayed by Hegel, by Aristotle, by Freeman and by Thompson? And has the family, thus protected, been so guarded because it is the germ-cell of society, and is, therefore, made an object of the enlightened solicitude and care of all civilized nations?

Thompson, in considering this question, has pointed out solid ground to stand on; that there are certain rights and duties which are *sui generis*, which belong particularly to the family, and which grow, not out of contract, but out of *status*. Such, manifestly, is the duty of support, which it is the very object of the exemption laws to secure to the family. The definition which has been given of the term *status*, exactly describes the notion of family. "There are classes of persons who, because of a peculiar moral relationship, in which they stand towards each other, or because of the peculiar functions they discharge in the public economy of the State, are invested with special rights, and made liable to special duties over and above the general rights and duties they share equally with all other members of the community. Such special rights and duties, as distinguishing the person to whom they belong, constitute that person's *status*."[19]

Does not this precisely describe the rights and duties peculiar to the family relation; and does it include a single right or duty of master or servant? Thus we have here a sure test for the solution of the question. The master and servant are not invested with a *status*; their mutual rights and duties are such only as arise from contract. And it seems impossible to conceive of any other test or principle which would be a certain criterion; and the tendency of the decisions is emphatically in the direction of its adoption. But the confusion with which the question is perplexed, is greatly increased by loose expressions and *dicta* which are let fall in some of the decisions. Thus, in a late decision by the Supreme Court of Indiana,[20] it was held that a widower, whose house was kept by a family hired therefor, who cared for his room, he, having an adopted child, temporarily absent, was a householder. The essential family relation existed between the father and the child; and the court held that he was a householder, adopting a test given by Thompson—the duty to support the child. The court rested the decision on this ground alone, and cast out of the case the consideration of the employment of servants. This was, perhaps, a sufficient *ratio decidendi*; but the court adds, as an additional ground or reason for the decision, the case of Brown v. Stratton.[21] The court, in citing the decision in that case, puts it thus: "Brown leased the premises, retaining one room, the tenant furnishing and preparing food, and it was held that Brown was to be regarded as a householder." Thus this would appear to be the question on which the decision in that case was made; and it would seem that the mere ownership of a house and the occupancy of a room therein would be such a "householding" as would constitute the head of a family. But a consideration of the case there cited shows clearly that this was not the real ground of the decision. The first and pivotal point in that case was stated by the court as follows: "One of the questions presented is, whether the voluntary abandonment by the plaintiff (the wife) of her husband, previous to his death, destroyed her right to the homestead; or, in other words, whether the husband, without any children, was the head of a family?" In passing upon this question, which was decisive of the case, the court say: "We therefore conclude that whilst a marriage *de jure* exists, the husband is a head of a family, though composed only of his wife, who has left him." On the other question the court say: "It is also insisted that Brown ceased to be a housekeeper after he rented the farm to Hill, and he occupied but one room in the house. The

[19] Amos' Science of Jurisprudence, 231.

[20] Bunnell v. Hays, 1 Ind. Law Rep. 550.

[21] 8 Cent. L. J. 46.

tenancy of Hill did not, we think, divest Brown of his right." But that *status* had been legally fixed by the law and by the marital relation; and until that *status* was changed by act of law, the husband was, and he would remain, the head of a family "whilst the marriage *de jure* existed." The opinion, therefore, in Bunnell v. Hays, so far as it is made to rest on the case of Brown v. Stratton, is misleading, in so far as it attempts a statement of the ground of decision in the latter case. Both of the cases of Bunnell v. Hays and Brown v. Stratton, are therefore reconcilable with those decisions which adopt as a principle of decision the criterion of a *status*; but the inexact statement, contained in the former case of the ground of decision in the latter case, is not only erroneous and misleading, but would render impossible the reconcilement of the decision with the majority of the cases, inasmuch as it does not advert to, nor embrace any consideration of the policy on which the law is founded. So that case also cites as in point and in its support the case of Myers v. Ford.[22] But that is not properly an authority, because in Wisconsin the statute is exceptional and accords the exemption to any resident of the State, not limiting the privilege to a householder only.

Of the cases which ignore, or do not adopt, this criterion, Rau v. Oldridge[23] illustrates fairly the character of the reasoning which leads to this conclusion. That case arose under a statute exempting property from distress; and the question was, whether a widow, keeping a boarding-house, with a female friend residing with her, and female servants, besides the boarders, is the head of a family. The court say: "According to the etymology of the word, it would be clearly a family. Lexicographers derive the word from the Latin word *familia*, which means 'the whole of the slaves in a household.' *Famulus* means a slave. And the primary meaning, as given by Worcester, is 'persons collectively who live together in a house or under one head; household.' The primary meaning, as given by Webster is, 'the collective body of persons who live in one house and under one head or manager; a household, including parents, children and servants, and, as the case may be, lodgers or boarders.' Thus it is seen that the word has a broad and comprehensive meaning in general use. Bouvier says the word has a restricted sense, which only includes the father, mother and children; but in a more enlarged sense it includes all individuals who live under the authority of another, and includes servants of a family. Thus it is seen its legal meaning differs but little from its general acceptation. That appellee was the head of this household is manifest. And it would seem to be clear that it constituted a family in the ordinary acceptation of the term." The decision rests, therefore, on the etymology of the word, or its literal, primitive meaning, not viewing it in the light of its origin and history, and of the policy of the laws made for the benefit of the family. It assigns no other reason than that it "is designed to enable the head of the family to keep its members together and to support them." It does not point out the real reason and purpose of the law, and of the State, in thus keeping the members of the family together; nor that, as between master and servant, such reason is not found to exist; nor that, as between master and servant, there is no *status*, no mutual dependence, no right or duty of support; nor that the policy of the law—the ultimate good of the commonwealth—requires not that master and servant should be kept together, and that, therefore, they are not a family within the spirit and intent of the law. It should be borne in mind that creditors have rights which should be held sacred, subject only to such limitations as are imposed by the good of society at large. *Prima facie*, and subject only to this policy, all of a debtor's property is liable to sale on execution. This wise policy is to protect the family from destitution and dissolution; to provide a secure fund for the education and support of its members, that they may not become outcasts, illiterate, immoral and dissolute,—in short, that some reasonable opportunity may be vouchsafed to them to fit themselves to become useful members of society. To accomplish this object, as between a creditor and a debtor who is the head of a family, the State may well intervene and say that a certain fund shall be kept sacred to those uses. But does reason of State exact more than that as against the creditor? Is it not also a principle of law that each shall ren-

[22] 22 Wis. 139.
[23] 90 Ill. 250.

der to every other his due? As between these two policies—the protection of the creditor and the protection of the family—there must be some reconcilement; or at least the line bounding and dividing them should be ascertained, not by the mere *arbitrium* of a court, but by a decision of the question according to the reason of things.

By a vastly preponderant current of decisions, the foregoing criterion of *status* has been adopted. The question was elaborately considered, and with deep searching into the reason and policy of the law, in the case of Calhoun v. Williams.[24] The question was, whether an unmarried man, a farmer, keeping house and having no person living with him except his farm hands, was a "householder or head of a family." The court, in passing upon the question, held that the privilege was intended not so much for the benefit of the person to whom it is given, as to the head of the family; to save the family from suffering and want; that its theory and policy is founded upon the principle that there is a natural and moral obligation on the head of the family to provide for the support of his wife and children, and other persons dependent on him, towards whom his obligation is equal, if not paramount, to that of paying his debts. "The family may consist of a wife and children, or of other persons, who may stand in a state of dependence in the family relation; or it may consist of persons standing in either of those relations to the head of the family, whether the father, or mother, or a brother, or a sister, or other relation is the head; but they must be persons who are dependent, in some measure, on the head for support, and who have an interest in his holding his property, and who would be prejudiced by its seizure and sale under execution, and who would be benefited by its exemption." The court also formally adopts the test suggested by Thompson,—a test by which the question can always be satisfactorily and definitely solved, because it always keeps in view the intent and policy of this class of legislation. "The duty to support is also made the test. He upon whom the law imposes such a duty, growing out of *status*, and not out of contract, and the persons to whom he owes this duty, if dwelling together in a domestic establishment, constitute a family of which he is the head." The court, in its opinion, sums up, briefly and comprehensively, the reasons which have been suggested or expressed in the opinions of other courts who have announced the same doctrine.[25]

This decision, in Calhoun v. Williams, is one of the best reasoned and most learned of the many decisions announcing this doctrine. And whoever traces out the genesis and historical development of the institution of the family, as well as the history of jurisprudence in its bearings upon that institution, will find this decision in exact harmony with the spirit of the laws. Sociology, ethics, comparative politics, jurisprudence are all at one on this question. And the broader our survey of human society and of man, as a social being, the more strongly entrenched does this position become. This unanimous and corroborative view must be, not without some reason, deeply imbedded in the social structure. It surely can not be merely fortuitous that all the human sciences, which are related to the law and united to it as by a common bond of union, adopt one and the same view of the family as an institution, and all point to the same grounds of its momentous import, and to the same reasons for its protection. When, therefore, the courts, arguing from similar premises, arrive at the same conclusion, the weight and authority of their decisions are vastly increased by the support they find in kindred branches of science; and when we find courts traveling out of the old highways, assigning to the family an entirely novel character, treating as essential parts of the institution elements which never have been considered as an integral part of it,—when courts base their decisions upon this new train of reasoning, which conflicts with the reasoning of other learned tribunals, and finds no support, by analogy or otherwise, in any other department that deals with social man, it may be gravely questioned whether in this one instance the old is not right, and the new is not wrong. And we believe that the divergence and conflict between these decisions will be found to

[24] 32 Gratt. 18.

[25] Shipe v. Repass, 28 Gratt. 716, 730; Lynch v. Pace, 40 Ga. 173; Wilson v. Cochran, 31 Tex. 677; Whalen v. Cadman, 11 Iowa. 226; Marsh v. Lazenby, 41 Ga. 153; Sallee v. Waters, 17 Ala. 486; Sanderlin v. Sanderlin, 1 Swan. 441; Sears v. Hanks, 11 Ohio St. 298; Garaty v. Du Bose, 5 S. C. 493; Calhoun v. McLendon, 42 Ga. 406.

have arisen, or been greatly increased, by the causes assigned at the commencement of this article: By the omission to advert to the reason and policy of the exemption laws in a majority of the States, or by incautiously following decisions based on statutes which have adopted some new rule in favor of the resident of the State, or for some other reason of a local and insular character.

W. L. PENFIELD.

PROMOTERS OF CORPORATIONS — RELATIONS TO STOCKHOLDERS.

LUNGREN v. PENNELL.

Supreme Court of Pennsylvania, February, 1881.

The promoters, projectors or organizers of a corporation or association do not stand in a fiduciary relation with the shareholders. They may sell property to such association at such price as may be agreed upon between them without reference to the original cost. They are not bound to disclose the profits they realize by the transaction.

Appeal from the Common Pleas No. 3, of Philadelphia County.

Bill in equity, between Charles H. Lungren and William A. Bell, trading as Lungren and Bell; William Milligan, William E. Rowan, Nathan Brooke and Edward H. Pugh, trading as Brooke and Pugh; Allen Tomlinson and Francis C. Hill, trading as Tomlinson and Hill; Thomas A. Lancaster and Clayton N. Wills, trading as Lancaster and Wills; J. Graham Tull, T. G. Wall, and Washington Garner, suing as well for themselves as for all other subscribers to the stock of the Treton Oil Company of Ohio (except the defendants), who should become parties to the suit, and contribute to the expenses thereof, complainants; and William H. Pennell, Abraham S. Jenks, Benjamin W. Harper, and The Treton Oil Company of Ohio, defendants.

The bill, filed March 15, 1867, and amended December 30, 1874, averred that the defendants, Pennell, Jenks and Harper, having formed a fraudulent conspiracy to cheat and defraud the complainants, had in 1864 purchased certain lands in Ohio, supposed to be oil lands, for the sum of $28,136; that after said purchase they formed a company, known as the Treton Oil Company of Ohio, to work said lands; that by fraudulent representations to the complainants and others, to the effect that all subscribers to the stock of said company would be on the same footing as the defendants, and that the real value and purchase-money of the land paid was $105,000, they induced complainants and others to subscribe to the capital stock of said company, the complainants subscribing the following sums:

Lungren & Bell,	1000	shares,	$2500
William Milligan,	500	"	1250
William E. Rowan,	500	"	1250
Brooke & Pugh,	500	"	1250
Tomlinson & Hill,	500	"	1250
Lancaster & Wills,	500	"	1250
I. G. Tull,	1000	"	2500
Washington Garner,	500	"	1250
T. G. Wall,	1000	"	2500

That a very large sum of money having thus been paid in, defendants conveyed to said company the lands purchased, and took from the treasury thereof in payment therefor the sum of $105,000, the difference between which sum and $28,136 they then divided among themselves. That the said company proved a failure, and that the stock thereof was worthless, and that defendants, being officers thereof, had charge of the books and papers, and refused access thereto to complainants; wherefore the bill prayed: 1. That defendants be decreed to repay to complainants their several subscriptions with interest. 2. Or that the stock be decreed to be sold, and that the defendants be decreed to pay complainants their losses. 3. Or that issues be awarded to determine complainants' several damages, and that the defendants be decreed to pay the same. 4. Or that the said company be required, or the complainants be permitted, in its name to sue defendants, in order to force said defendants to pay into said company's treasury the amount of their unlawful profits.

On September 25, 1867, answers were filed by the Treton Oil Company, and by Harper, Jenks and Pennell. The answer of the company averred that it was duly organized by its co-defendants and others, and that the lands purchased were conveyed to it, and were the basis of its organization. It further denied all deceit or fraud on its part.

The answer of Harper, Jenks and Pennell averred that the defendant, William H. Pennell, had bought the lands in question in 1864; that subsequently he agreed to and did allow the following persons to take each a one-sixth interest in said purchase, viz., R. D. Pennell, Henry W. Childs and O. C. Childs, and the defendants, Harper and Jenks; that afterwards the six so interested agreed to divide the interest in said lands into eighty-sixths, and not to sell any one interest for less than $1,250; that in pursuance of said agreement, the defendant Harper afterwards sold one undivided eighty-sixth interest to complainant Milligan for $1,250, and that the defendant Pennell had in like manner sold one eighty-sixth interest to each of the other complainants for a like sum, except to complainants, Lungren and Bell, Tull and Wall, and that to them he had sold two eighty-sixth interests each for the sum $2,500 each; that defendant Jenks sold no interest to any of the complainants; and, further, that various other similar sales of interests were made to others than complainants; that such sales were all *bona fide*, and without any false representa-

tions made by defendants as to the value of the land, or as to the complainants coming in on equal terms with defendants; that the Treton Oil Company was afterwards organized; that stock was awarded thereon to complainants and others at the rate of $2.50 a share, in proportion to the interest owned by each; that the lands purchased were then conveyed to the said company, and that not one cent was ever taken from the treasury thereof to pay for said lands. The answer finally denied that complainants had been denied access to the books of the said company, and asked that respondents be dismissed with costs.

A replication was filed and the case referred to Samuel Robb, Esq., as Examiner and Master. The following are substantially the facts of the case as found by him in his report, and as adopted by the Supreme Court in its opinion:

"In the latter part of November, 1864, one Henry W. Childs, visited Venango County, Pennsylvania, and by his invitation Wm. H. Pennell, one of the defendants, accompanied him. By Mr. Pennell's invitation, B. W. Harper, another defendant, went with them. When they had accomplished the object of their visit, on the proposal of Mr. Childs, they went to West Virginia, to look at oil lands there, meeting on the way A. S. Jenks, another defendant, who was going out to look at some land he had agreed to buy. Mr. Jenks was not satisfied with this land, and the party accepted an invitation from a Mr. Hill, a member of the Hocking Valley Oil Company, to visit the lands of that company in Athens County, Ohio, which were represented as oil lands of great prospective value. On arriving at Athens, they inspected these lands, consisting of two farms in fee and two leased premises which were very highly spoken of, as good prospective oil properties. The Hocking Valley parties offered to sell these properties to Childs, Harper, and Jenks for $150,000, but the offer was declined. The next day two of the Hocking Valley Company came to Pennell and offered to sell him the properties at $45,000, he paying two-thirds of the price and they to pay one-third, and to have one-third of any profit that could be made out of them. After some negotiation Pennell agreed that he would take the properties at the price which the original contracts with the owners would show them to have cost, if upon his return to Philadelphia he should think successful oil companies could be organized. Messrs. Childs, Pennell, Harper and Jenks immediately returned to Philadelphia, arriving there on December 11, 1864, and on the next day, W. H. Pennell, after conference with his brother, R. D. Pennell, telegraphed to Mr. Martin, who represented the Hocking Valley Company, that he would take the properties as agreed. So far it is perfectly manifest that the purchase of the properties in question was made by W. H. Pennell, individually, on his own responsibility, without any knowledge on his part, before he left Philadelphia, that he was to buy the properties at all. He did not even knew of their existence, and, of course, he had no relations whatever, as to the purchase, with any of the plaintiffs or defendants. Those relations were established subsequently to the purchase and in the following manner. Some days after the agreement to purchase, but not all on the same day, Messrs. Childs, Harper and Jenks called on W. H. Pennell, and either at his solicitation, or on theirs, he agreed to sell to each of them a one-sixth interest in the purchase at the cost rate, and the same interest to a Mr. C. O. Childs, and R. D. Pennell, his brother. These six persons, thus being the owners of the whole, agreed among themselves to organize two companies, putting a fee and a lease in each company, to make each consist of forty-two parts, and that no interest should be sold for less than $1,250. Up to this point, no one of the plaintiffs had acquired any interest in the enterprise, and no relation, confidential or otherwise, was established between any of the plaintiffs and any of the defendants. The six persons named were the only parties interested in the project. Shortly afterwards, some of the plaintiffs and others more or less acquainted with the Messrs. Pennell, and who had learned in one way or another of W. H. Pennell's visit to the oil regions, called upon them, to inquire about his visit, and were informed that he had purchased or had arranged to purchase certain properties in Ohio, and that he and his brother and certain friends intended to organize two oil companies; that each company would consist of forty-two interests, and that each interest would cost $1,250. He was solicited by some of the parties thus calling to sell interests to them. To one of the applicants, he stated what the land had cost, though the price was not remembered by the witness; to others no prices were mentioned, no questions being asked; some, the majority, of the plaintiffs testified they inferred from what he stated, that the cost was the aggregate of the interests at $1,250; and others inferred he was making a profit. It was understood by all that companies were to be organized, and sales of interests were made conditionally on every purchaser joining with him and his friends in the organization thereof. The Master further finds that it does not appear that the Pennells or Harper and Jenks made any representations as to the character of the lands which they did not believe to be true, relying upon the statements made by the parties in Ohio, and upon what had been seen, where they were confident that they and those joining with them in the speculations would make large profits. While these negotiations were going on, the titles to the properties were being examined, and were finally pronounced good; after which, during January, 1865, the Messrs. Pennell sold or received pay for twenty-two interests at $1.250 each. The Messrs. Childs sold their two-sixth interests to R. D. Pennell, at an advance. The conveyances for the properties were made during January, 1865, to W. H. Pennell in fee, and the actual consideration paid in

each instance, but one, was recited in each instrument. An assignment of one lease did not recite the consideration, but the actual sum paid for it was $3,136. These several conveyances were entered for record in Athens County, Ohio,—the deeds on January 26 and 30, and the assignment and lease on April 6, 1865. On February 7, the parties interested, including the purchasers of eighty-fourth interests, held a meeting and resolved to form one company instead of two; that the deeds and assignments of leases offered by W. H. Pennell be received at the price offered—$105,000; that the capital stock should consist of 200,000 shares at the par value of $2.50 each, which should also be the subscription price; and that 20,000 shares of stock should be reserved as working capital, and sold at not less than $2.50 per share. On February 25 a charter was procured, and in March meetings were held, officers elected, and money was appropriated to prosecute the work of the company. On March 11 and April 5, by proper instruments, the properties were conveyed to the company, for which no money was paid. It was testified by several witnesses that at the organization meeting of February 7, Mr. Thomas T. Tasker, Sr., one of the purchasers of an interest, stated that these properties for other than oil purposes were worth very little; but as paying oil properties they would be cheap; that it made no difference to them whether they cost Mr. Pennell one dollar or one hundred dollars per acre, and that doubtless he was making a profit out of them. The plaintiffs testify they did not hear these remarks. There was also evidence that at this meeting Mr. Pennell offered to take back the interests of any purchasers who were dissatisfied. The Master further finds at the time of, and for months after, the organization, all the parties appeared to have estimated the property as very valuable, and to have confidently expected to realize large profits from the speculation. He finds also, and upon abundant testimony, that all the purchasers of interests, except the plaintiffs, presumed or were told and acted on the belief, that Mr. Pennell or the parties from whom they respectively bought were making a profit. Considerable sales of working capital were made at $2.50 per share, and the money was paid into the treasury and used for the purposes of the company. Soon after the organization a prospectus was prepared, setting forth the name of the company: Capital stock, $500,000; 200,000 shares, par value $2.50; working capital 20,000 shares; names and addresses of the officers, and inviting subscriptions at the company's office. Two wells were sunk, but without success; though wells in the neighborhood were worked with profit. After further unsuccessful efforts to work the property, and numerous meetings of the directors, it was resolved at a meeting of the stockholders in February, 1867, to suspend work, and rent the farm. About this time, some of the parties feeling themselves wronged in the matter of the price paid for the property, decided to commence proceedings to get their money back, and on March 15, 1867, the present bill was filed. A very large amount of testimony was taken, and many other facts in addition to those we have recounted were found by the Master; and some material facts which he was asked to find by the plaintiffs he refused to find, either because he did not credit the witnesses, or because by reason of opposing testimony and of other facts and circumstances combined, he considered the weight of the testimony to be against the theory of the plaintiff. In his report, which is very full and elaborate, he states his reasons for the conclusions of fact at which he arrived."

* * * * * *

"The most serious complaint made by the plaintiffs, was to the effect that they were deceived by the representations of the defendants, or some of them, as to the cost of the property, and that they were told, they were to be admitted as purchasers on the same terms as the defendants. The Master very fully and carefully considers the whole of this testimony on both sides.

"He shows that the sales of interests were individual transactions, each being independent of the other; that there was an absence of certainty in the testimony of the plaintiffs as to what was said; that there was positive contradiction by the defendants, as to all the positive statements by the plaintiffs on this subject; that there was very considerable testimony by purchasers, other than plaintiffs, that no such representations were made to them, and that they were satisfied or were directly told by defendants that a profit was being made; that although thirty-one interests were sold to twenty-two different persons, only nine of the purchasers, representing twelve interests, joined in the bill. Five purchasers from Mr. Jenks do not complain or consider themselves aggrieved by him or by any defendant. Of sixteen interest holders, representing twenty-two interests purchased from the Pennells, only eight, representing eleven interests, are parties here; the remainder not thinking themselves misled or injured by the Pennells or by any defendant. The Master further shows that some of the plaintiffs were informed or admitted a knowledge that a profit was being made; and he argues that it is difficult to understand how the defendants, meditating such a fraud as is charged here, could have told or acted the truth to one set of purchasers, and told or acted an untruth to another set of purchasers, in respect of the same subject-matter, in an enterprise or speculation in which they were all about to become engaged. He further shows, that by the undisputed testimony, at the organization meeting, the deeds for the properties which recited the actual consideration paid were produced, and were open to the inspection of any one present, and that such action was entirely inconsistent with any theory of fraud as to the price. He refers also to the testimony of the witnesses, who state the declarations of Mr. T. T. Tasker at the same meeting, as to the small value of the

land except for oil purposes; and that it was a matter of indifference what had been paid for the properties; and also to the fact that the manifest purpose of all was to make a profit out of the land, not as agricultural, but as oil territory. Many other facts and circumstances bearing upon this branch of the case are presented by the Master, with great and convincing force, in favor of the correctness of his conclusions, but it is not necessary to repeat them all."

The Master was further of opinion that the facts showed no fiduciary relation to have existed between Pennell and complainants, and recommended therefore that the bill be dismissed with costs.

To this report exceptions were filed by the complainants on the ground, *inter alia*, that the Master erred in not finding that there was a fiduciary relation existing between Pennell and complainants, in not finding that complainants had been deceived and entrapped by the defendants into purchasing their interests by false representations as to the value of the lands purchased, and as to the footing upon which complainants were to stand as compared with that of defendants; and finally in reporting a decree dismissing the bill.

On December 13, 1874, the exceptions to the Master's report were argued, and on the same day the bill was amended by permission. The amendments consisted of new allegations as to the misrepresentations made by defendants to complainants, but comprised nothing as to which the evidence had not been already passed upon by the Master.

The report of the Master was then, by agreement, referred back to him to enable him to review the case in the light of the bill as amended. He reported that he had been "unable to find in any of the amendments any just grounds for changing the conclusions of his report."

Exceptions were filed, and the case twice argued before the court. The court having intimated an opinion adverse to that of the Master, argument was then heard in February, 1879, as to the form of the decree. Defendants then moved for leave to answer the amended bill, which leave was refused them.

On April 21, 1880, the opinion of the court was delivered by Yerkes, J. The court were satisfied from the evidence that defendants Harper and Pennell had occupied a fiduciary relation towards the complainants; that they had deceived them as to the real value of the land bought, and that they fraudulently represented to them that they were to come into the concern on the same footing as defendants themselves.

The following decree was accordingly entered: "And now, April 21, 1880, the above case having been argued. and after full consideration, it is ordered and decreed that the defendant, B. W. Harper, pay to the plaintiff, Wm. Milligan, the sum of $1,778.03, and that the defendant, William H. Pennell, pay to each of the plaintiffs, Lungren & Bell, J. G. Tull and T. G. Wall, the sum of $3556.06; and to each of the plaintiffs, William E. Rowan, Brooke & Pugh, Tomlinson & Hill, Lancaster & Wills, and Washington Garner, the sum of $1,778.03, and that the said defendants, Pennell and Harper, pay the costs, and that the bill be dismissed as to the defendant Jenks without costs."

The defendants, Pennell and Harper, thereupon took this appeal, assigning for error, *inter alia*, 1. The entering of a decree for complainants on the grounds and for the reasons assigned by the court. 2. The entering of a decree whereby specific sums were ordered to be paid by specific defendants to specific complainants. 3. The action of the court in not dismissing the complainant's bill for multifariousness and misjoinder of parties. 4. The refusal to allow the defendants to file answers to the amended bill.

C. Stuart Patterson and *William A. Porter* (with them *T. De Witt Cuyler*), for appellants; *J. Howard Gendell*, for appellees.

GREEN, J., delivered the opinion of the court:

The learned master in the court below, for reasons expressed at length in his report, recommended a decree in this case dismissing the bill. His conclusions were founded on an absence of merit in the case of the plaintiffs. The learned court differing in opinion from the master, as to his conclusions upon the facts of the case, and as to the application of equitable principles involved, held that there was liability established as to some of the defendants, in favor of the plaintiffs, and made decrees accordingly. The decrees actually made were that the defendant, B. W. Harper, pay to the plaintiff, William Milligan, $1778.03, and that the defendant, Wm. H. Pennell, pay to Lungren & Bell, J. G. Tull and T. G. Wall, $3556.06; and to each of the plaintiffs, Wm. E. Rowan, Brooke & Pugh, Tomlinson & Hill, Lancaster and Wills, and Washington Garner, $1778.03. The bill is dismissed as to A. S. Jenks. It will be seen at once, that there was no common liability of both defendants either to all or to any one of the plaintiffs. On the contrary, there was a judgment for a specific sum of money in favor of one of the plaintiffs, against one of the defendants only, and different judgments, in favor of one set of plaintiffs against the other defendant for one joint sum, and in favor of another set of plaintiffs for several and not joint sums, payable to each. It is difficult to conceive of more discrepant and variant causes of action than are indicated by the decrees in question. If the plaintiff Milligan had a valid claim against the defendant Harper, but not against the other defendants, and the other plaintiffs had different claims against one of the other defendants, but none against Harper, it is not possible to understand what community of right there was, or could be, which would justify the joining of the rather numerous plaintiffs in one bill against the several defendants. The incongruity, so far as the fact is concerned, is explained when we dis-

cover by the testimony, and the reasons given by the learned court below for the decrees, that there never was a common cause of action in the case. In the opinion of the court it is said: "The plaintiff Milligan bought his stock of the defendant Harper, and false representation was made of the price of the land at the time of sale. We find that nearly all of the other plaintiffs bought of Wm. H. Pennell. As to the two about which there seems to be some doubt, they certainly bought of R. D. and W. H. Pennell. Lancaster and Wills seem to us to have bought of Wm. H. Pennell, whilst Tomlinson and Hill may have bought of the two. To all the defendants at the time of the negotiations for sale of interests, representations were made that no profit was being made from the sale." By this it appears that the causes of action as recognized and enforced by the court were false representations, made by individual defendants to individual plaintiffs, in regard to the sale by the former to the latter of certain property interests. The court state further in making up the decrees: "The plaintiffs bought eighty-fourth interests at $1250. This was based upon the amount of property being $105.000. The actual price paid by the defendants was $28,136. One eighty-fourth of this would be $346.85. The difference between this and $1250 would be $903.15, and with interest to date would be $1778.03, which should be paid to each holder." This calculation shows that there was a precise, well defined measure of damages, by which the right of each plaintiff, entitled to recover, could be determined. We think it clearly established that if there was any right of recovery at all, it was a several and individual right, depending upon the circumstances, including the false representations, of each case, with an ascertained legal measure of damages applicable to each, and that the appropriate remedy was by an action at law by each person injured against each person who injured him. It follows that the bill and amendment were multifarious, and defective for misjoinder of parties. We do not, however, decide the case upon these grounds. These objections were not made until after final hearing, when it was probably too late, under the decisions. Persch v. Quiggle, 7 P. F. S. 258.

The more important question in the case is, the right of the plaintiffs to recover on the merits. We have given a very careful attention, both to the able and exhaustive report of the master, and to the opinion of the learned court below, and find that we differ from the court, and concur with the master in his conclusions upon the whole case. The leading facts as found by the master are as follows: * * * (In this and the next following space marked with asterisks occur the passages already cited in setting forth the facts as found by the master.)

* * * * * *

After a very patient and careful examination and consideration of the testimony, we are convinced that in all the important and controlling elements of the case, his findings and conclusions are fully sustained by the testimony.

* * * * * *

The credibility of witnesses and weight and force of their testimony were matters of which the master was far more competent to judge than the court below, or this court, and we do not feel at liberty to deny the correctness of his conclusions as to conflicting testimony. As to the controlling facts, there is very little conflict of testimony. When W. H. Pennell agreed to buy the property in question, he was neither the agent of the plaintiffs, nor did he stand in any confidential relation to them. He could not have required any of them to pay any part of the purchase-money. That liability rested entirely upon himself. How, then, can it be said that he purchased as agent for them, or as promoter of a common enterprise? He did not purchase for a company, because no company was in existence. There was no common project at any time between the Pennells and the plaintiffs. On the contrary, W. H. Pennell, having contracted on his sole responsibility, for the purchase of the land on December 12, sold one-sixth interests in the purchase to various persons after that date; and it was these one-sixth owners who sold, as individuals, portions of their interests to individual plaintiffs.

The principles which control such a case are not difficult of statement or application. Our own case of Densmore Oil Co. v. Densmore, 14 P. F. S. 43, furnishes the test. We there held "that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may originally have cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were in no sense agents or trustees in the original purchase, and it follows that there is no confidential relation between the parties which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy."

In the case of McElhenney's Appeal, 11 P. F. S. 188, McElhenney, who represented himself as the owner of the land, but in fact was not, agreed with Boyd and others, that if they could sell it for $40,000, they should share the profits with him over the cost price, which he said was $12,000. This plan was carried out. Boyd and others formed a company to which the land was sold at $40,000. The profits were divided with McElhenny, and the company filed a bill against his administrators to recover the money paid to him out of the treasury as part of the $40,000 purchase-money. False representations as to the

cost of the land were alleged and proved to have been made, and it was also shown that McElhenny never was the owner of the land, though it was ostensibly sold as his to the promoters, who in turn sold it to the company. The court, Thompson, C. J., in speaking of the transaction, said: "It nowhere appears that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co., and others, although he bought it to sell again, no doubt. He had a perfect right, therefore, to deal with them at arm's length, as it seems he did;" and, again, "If the property was not purchased by McElhenny for the use, and as agent of the company, but for his own use (and this is the proof in the case), he might sell it at a profit most assuredly. No subsequent purchaser from his vendees would have any right to call upon him to account for the profit at which he sold to them. They have not pretended that he was their agent in making the purchase, and I am unable to understand the ground of a right in the company to demand it. The difference between the sum he paid and that at which he sold he was as fairly entitled to, as to the sum paid." These considerations are directly applicable to the undoubted facts of the present case. It is too plain for argument that W. H. Pennell did not contract to purchase the land as the agent of anybody. His sale of one-sixth interest to his co-defendants and others was made at the actual cost of the property. Then these one-sixth owners, instead of forming a company, as in McElhenny's case, sold eighty-fourth interests to the plaintiffs and others. Then it was that the whole party, as owners of the eighty-fourth interests, including all the plaintiffs and all the defendants, and several others, who are not parties, combined together to form a company with a capital of $500,000, on the basis of the property in question at a cost of $105,000. The owners of the eighty-fourth interests were the immediate promoters of the company, and the purpose of their combination was to sell to the public at $2.50 per share stock which cost them 59 cents per share. This, of course, they had a right to do. Had the property yielded oil in paying quantities, as was confidently expected by all, they would doubtless have been able to market the stock at par or upwards, and thus realize the anticipated profits of the common enterprise. It happened otherwise, and then a few of those who purchased their individual interests at a larger price than was paid by their vendors, seek to get back their money by the aid of salutary equitable principles, which are not applicable to the facts of their case. In our opinion, the plaintiffs are not in a position to avail themselves of the benefit of the doctrine which imposes liability to refund upon persons who purchase as agents or promoters. We have examined with much care the evidence relied upon to establish these relations between the defendants and plaintiffs, and we find it to be affected with so much uncertainty and confusion in the testimony of the plaintiffs, so much direct contradiction in the testimony of the defendants, and so much inconsistency with the other facts and circumstances of the case, as to be incapable of use as the foundation of a judicial decree. It follows that the decree of the court below must be reversed and the bill dismissed.

Decree reversed and bill dismissed, and it is further ordered, adjudged and decreed that the costs of the case, including the costs of these appeals, be paid by the appellees.

NOTE.—The point upon which this decision turns, viz.: That the projector of an association stands in no confidential relations with the shareholders, was decided differently by the English Court of Appeals at the February term of 1877, in the very well considered case of the New Sombrero Phosphate Co. v. Erlanger (5 Ch. Div. 73; 3 App. Cas. 1218; 4 Cent. L. J. 510). It was there held that persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property and would influence the company in deciding on the reasonableness of acquiring it. See also on this subject Bank of London v. Tyrrell, 10 W. R. 359; 10 H. L. C. 26; Phosphate Sewage Co. v. Hartmont, 5 Ch. Div. 394; 24 W. R. 530; and note 3 Cent. L. J. 826, and cases there cited.—EDITOR.

CONTRACT FOR PERSONAL SERVICE — COMPENSATION.

BUTLER v. WINONA MILL CO.

Supreme Court of Minnesota, July, 1881.

Where, in a contract for personal service, the plaintiff stipulates that his compensation shall be fixed at the discretion of the defendant, he must, in the absence of fraud or bad faith, accept the amount so fixed, and can not sue for a *quantum meruit*.

Appeal from judgment, County of Winona.

Berry & Morey, for appellant; *Wilson & Gale*, for respondent.

CLARK, J., delivered the opinion of the court:

It appears from the findings of fact in this case that the plaintiff performed services for the defendant corporation under a contract whereby "it was agreed that plaintiff was to enter the service of the defendant in superintending the mason work of a mill, about to be erected by it, and the amount of the plaintiff's compensation therefor was to be left entirely to the defendant to determine and fix after the services were performed, at such price and amount as, under all the circumstances, it (defendant) should consider right and proper."

It further appears from the findings "that, after such services were completed, and before the ac-

tion was brought, the defendant determined and fixed upon the sum of $2.50 per day as the amount of plaintiff's compensation, and as the amount and price thereof, which, under the circumstances, it (defendant) considered right and proper."

The further fact is found that the services were reasonably worth $4.00 per day. The court below gave judgment for the amount of the compensation at the rate of two and a half dollars per day. The plaintiff claims that he is entitled to a judgment at the rate of four dollars per day. We think the judgment, as rendered, is correct. The contract was clear and unambiguous. The stipulation that the amount of the compensation should depend upon the judgment and decision of the employer may have been an undesirable one for the plaintiff to consent to; but he, nevertheless, chose to accept the employment on those terms. The contract was an entirety, and of obligation in all its parts, and the law can not, after it has been executed, relieve the plaintiff from the consequences of one of its stipulations, which proves to be disadvantageous to him. That would, in effect, be making a new contract for the parties.

It was the duty of the defendant to determine and fix the amount of the compensation honestly and in good faith, and if it did so fix it, the obligation of the contract was fulfilled, so far as that matter is concerned.

It is not alleged in the pleadings, nor found in the decision, that the defendant acted fraudulently or in bad faith, and fraud or bad faith is not to be presumed. The mere fact that the defendant fixed the compensation at an amount considerably less than the learned judge of the trial court found, upon the evidence before him, the services were reasonably worth, is not of itself sufficient to justify an inference of fraud or bad faith.

It is further objected to the judgment that it is not alleged in the answer that the defendant performed the special contract set up by determining and fixing the amount of the plaintiff's compensation. The objection is deemed not to be well taken.

The case is before us upon the pleadings and decision of the court only, and we are bound to assume that the findings of fact were established by evidence introduced without objections. The complaint is on a *quantum meruit* for services. The answer denies the performance of services of of any greater value than $231.88, and sets up the special contract, but does not allege that the defendant determined or fixed the amount of compensation. The allegations of new matter are put in issue by the reply.

The plaintiff, upon the facts found, must recover, if at all, upon the special contract, and not in strict conformity to the allegations of the complaint, and he is not now in a position to object that performance of the special contract on the part of the defendant, with respect to fixing the amount of compensation, is not alleged in the answer, the evidence to prove it having been introduced without objection or exception on his part.

The judgment appealed from is affirmed.

MITCHELL, J., not sitting, having tried the case in the court below.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MISSOURI.

May-June, 1881.

SUNDAY — SALE OF GOODS COMPLETED ON MONDAY.—Although the prices of articles sold were agreed upon on Sunday, yet the contract of sale not having been completed until the following day, when the goods were delivered, it can not be regarded as a contract made on Sunday. Lyon v. Strong, 6 Vt. 219; Adams v. Gay, 19 Vt. 358; Lovejoy v. Whipple, 18 Vt. 379; Smith v. Bean, 15 N. H. 577; Mason v. Thompson, 18 Pick. 385; Henning v. Powell, 33 Mo. 468; Fritsch v. Heislin, 40 Mo. 455; Luebbering v. Oberkoetter, 1 Mo. Ap. 399; Gwinn v. Simes, 61 Mo. 335; Benjamin on Sales, sec. 557. Affirmed. Opinion by HOUGH, J.—*Rosenblatt v. Tounsley.*

PERJURY— ASSIGNMENT— INSTRUCTION.— Defendant was convicted of perjury. The evidence given by him before the grand jury, upon which the charge of perjury was predicated, was in effect that he had never received or collected any money from Robt. C. Pate, or any other person engaged in the business of gambling, for the purpose of paying the same to any member of the board of police commissioners; while one of the assignments of perjury was that defendant did in truth and in fact collect and receive from Robt. C. Pate, large sums of money for the purpose of paying the same to a member of the board of police commissioners, for the purpose of getting information as to raids, etc. The instruction to which most objection is made, is in substance, that before defendant can be convicted, it devolves upon the State to prove to the satisfaction of the jury, by two credible witnesses, or one credible witness and corroborating testimony beyond a reasonable doubt, that R. C. Pate did give defendant money within three years next before the second Monday in March, 1879, with the purpose at the time that the same should be used for bribing a police commissioner, and that defendant knew, at the time he so received the money, of the felonious intent of Pate to bribe. It is claimed by defendant's counsel, that the above instruction is calculated to mislead, and carried the jury outside of the charge and authorized a conviction on an oath never taken by defendant. *Held*, that if, after stating in the indictment the evidence as set forth above, the assignment had simply been that defendant had received money from Pate for the purpose of paying the same to a police commissioner, it would have been sufficient, and if the in-

struction complained of had been given at the instance of defendant, the State would have had the right to object, as it required her to prove more than was necessary to establish the charge. The fact, if true, that defendant received money from Pate to be paid to a police commissioner would constitute a link in the chain of evidence against such commissioner of the charge the grand jury were investigating, and if his testimony in every other respect was true, and false in this, he was as guilty as if his testimony was false in every particular. The assignment, though narrower in form, was broader in substance than was necessary, alleging more than was necessary to prove, and to this extent immaterial. Com. v. Smith, 11 Allen, 243. The grand jury was not investigating a charge against defendant, but endeavoring to find if a police commissioner had been guilty of receiving a bribe, etc., and it was important and material in that investigation to learn if any person engaged in the gambling business had given any person money to give to any of them. It makes no difference that the police commissioners were not indicted, or whether or not they were guilty; the false testimony of the witness to a material matter was nevertheless perjury. Affirmed. Opinion by HENRY, J.—*State v. Wakefield.*

CONTRACTS FOR PERSONAL SERVICES—WHERE EMPLOYEE LEAVES SERVICE BEFORE EXPIRATION OF TIME.—Where one person contracts to labor for another for a specified time, and leaves the service of his employer before the expiration of such time, without any cause proceeding from the employer or the "act of God," he can not maintain an action for the value of the services he has rendered. Posey v. Garth, 7 Mo, 94; Dickson v. Caldwell, 17 Mo. 595; Schnerr v. Lemp, 19 Mo. 40; Henson v. Hampton, 32 Mo. 408; 2 Parsons on Contracts, 36 and note *g*. For the rule in case of building contracts, *vide* Haysler v. Owen, 61 Mo. 270. As the circuit court disregarded the rule applicable to contracts for personal service, the judgment will be reversed and remanded. Opinion by HOUGH, J.—*Earp v. Tyler.*

SUPREME COURT OF KANSAS.

April 19, 1881.

CONSTITUTIONAL LAW — ELIGIBILITY FOR OFFICE—REMOVAL OF DISABILITIES.—1. Section 2 of article 5 of the Constitution of the State, as amended November 5, 1867, ordaining that no person who has ever voluntarily borne arms against the Government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of the government, shall be qualified to hold office in this State, until such disability shall be removed by law, operates upon the capacity of the person to take office; and if the disqualification is removed subsequent to the election and prior to the assumption of the office, the person, though ineligible under said provision at the time of the election, will not be disqualified when taking the office. 2. One P, who had voluntarily borne arms against the Government of the United States during the late Rebellion, at the election on November 2, 1880, was ineligible under the Constitution of the State to hold office. At such election, however, he was a candidate for the office of sheriff, and received a majority of the votes of the electors therefor. Afterwards, and before he received his certificate of election, and before demanding possession of the office, his disability was removed by law. *Held*, that he was entitled to the office of sheriff, and to enter upon and discharge its duties after the removal of such disability. *Quo Warranto.* Judgment for plaintiff. Opinion by HORTON, C. J.—*Privett v. Bickford.*

POSSESSION OF REAL ESTATE—REMOVAL OF IMPROVEMENTS—INJUNCTION.—Where A owns, and is in possession of, certain real estate, and B, believing himself to be the owner, and entitled to the possession thereof, forcibly dispossesses A, and takes possession of the property himself, and then makes valuable and lasting improvements thereon, and A then commences an action of forcible entry and detainer against B, obtains a judgment before the justice, and B appeals to the district court,—giving a sufficient bond, with ample security, that he will not commit or suffer waste to be committed on the premises, and that he will pay double the value of the use of the property, and all damages and costs, if judgment should be rendered against him; and B and his sureties are perfectly solvent, and B, expecting judgment to be rendered against him in the forcible entry and detainer case, threatens to remove the improvements, made by him, from the premises: *Held*, that A can not maintain an action for an injunction to restrain B from removing such improvements. Affirmed. Opinion by VALENTINE, J.—*Campbell v. Coonradt.*

BREACH OF PROMISE—JUDGMENT UPON DEFAULT—QUANTUM.—In an action for a breach of promise of marriage, the defendant was in default, and the court rendered judgment for the amount claimed in the petition, without any evidence being introduced in the case. At the next term of the court the defendant moved to set aside the judgment on account of said irregularity. He made no claim or pretense that he had any defense to the action, or that the judgment would be reduced in amount if the case was heard upon its merits. The court set aside and vacated the judgment absolutely: *Held*, error; that the judgment should have been set aside only conditionally—giving the plaintiff an opportunity to introduce evidence, and then the judgment should have been set aside, modified or affirmed in accordance with the evidence introduced. Modified. Opinion by VALENTINE, J.—*Ames v. Brinsden.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

29. Testator, after giving a large amount of personalty to his wife, followed this bequest with these words; "In view of the above bequest, and in view of other property already given to my wife, I hereby request her to deed, one year after my death, her separate real estate to our son, A B." The widow elects to take the bequest. Do these precatory words "I hereby request" create an imperative trust in the real estate of the wife in favor of the son, the same as if the testator had requested his wife to give to the son the personalty bequeathed to her by him. Give authorities. W. N. T.

Columbus, Ohio.

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30. Where a married woman holds a statutory separate estate, with full power to sell and convey the same jointly with the husband, under a statute requiring her to acknowledge the deed upon a private examination separate and apart from her husband in the mode pointed out by the statute—can she appoint and constitute an attorney in fact to execute the deed for her? And if so, shall she execute the power of attorney jointly with her husband and upon a private examination as required in the execution of the deed? Then, will this dispense with the certificate of acknowledgment on a private examination to the deed?

Washington, D. C. G. E. H.

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31. B, a constable, duly elected and qualified, receives a warrant for the arrest of C on a bastardy proceeding instituted at the instance of the relator and mother of the child. B negligently allows C to leave the State without arrest. B keeps the warrant for 13 months—refuses to return it. Suit is brought on his official bond. What is the measure of damages, if any, in the State of Indiana?

Madison, Ind. J. P. W.

QUERIES ANSWERED.

Query 17. [13 Cent. L. J. 119.] Can a surviving partner make an assignment for the benefit of creditors and therein make a preference of a creditor or creditors? If he can not, can the validity of said assignment be successfully attacked by an attaching creditor, or should a bill be filed to set aside the assignment and receiver appointed? When, in practice, as in Colorado, "the distinction between action at law and suits in equity is abolished," will the attachment prevail?

Denver, Col. J. M. E.

Answer. A surviving partner takes charge of the property of the firm as a trustee for the creditors and representatives of the deceased, and in the discharge of his duty as trustee he is held to the same strictness as ordinary trustees. This is the effect of both the English and American authorities. See *Ex parte* Ruffin, 6 Ves. 126; Murray v. Murray, 5 Johns. 60; Case v. Abeel, 1 Paige, 393; Martell v. Jackman, 3 Allen, 287; Ogden v. Astor, 4 Sandf. (N. Y.) 311. From the assets the creditors of the firm are first entitled to payment in full if sufficient, and if not, then ratably. 2 Story's Eq. Jur. 1253; Washburn v. Goodman, 17 Pick. 519; Ogden v. Astor, 4 Sandf. (N. Y.) 311; Crawshay v. Collins, 15 Ves. 218; Society v. Gibbs, 21 Cal. 595. The assignment can be successfully attacked by an attaching creditor. The action of the surviving partner in making the assignment with preference to certain creditors is void. See Barcroft v. Snodgrass, 1 Cold. (Tenn.) 430, and authorities therein cited.

Mobile, Ala. B. B. Boone.

Query 21. [13 Cent. L. J. 159.] Is a sleeping-car company liable for a robbery which takes place on one of its cars, where it was negligent in failing to keep watchman, etc.? Please cite authorities. H. H. W.

Answer No. 1. Yes. See Diehl v. Woodruff, 10 Cent. L. J. 66. Also Kinsley v. Lake Shore R. R., 125 Mass. 54.

Boston, Mass. E. B. Callender.

Answer No. 2. Sleeping car companies are not responsible as common carriers or inn-keepers. 73 Ill. 36. But an obligation rests upon them, similar to other bailees for hire, to use at least ordinary care towards their passenger and his baggage. Sleeping car companies are required to furnish their passengers with berths, keep a watch during the night, exclude unauthorized persons from their cars, and use reasonable care to prevent theft. If any are negligent in the performance of this duty, and a loss is thereby incurred by a passenger, he can recover for such articles as a traveler usually carries about his person, and for such an amount of money as may be reasonably necessary to defray his traveling expenses. Blum v. Southern Pullman Palace Car Co., 3 Cent. L. J. 591; Palmeter v. Wagner, 11 Alb. L. J. 149; Diehl v. Woodruff, 10 Cent. L. J. 66.

Mobile, Ala. B. B. Boone.

Query 23. [13 Cent. L. J. 159.] M, a wool buyer, purchased a bale of wool from N, a commission merchant. Other bales were bought at same time of N. The latter gave demand orders on warehouse for delivery to M of lot, including a separate order for bale in question. According to usage these orders represented the wool, and were sometimes delivered before invoice from merchant and payment from buyer, and all bales had to be reweighed by buyer, and settlement and payment made according to reweights. When invoice was made out, this bale, not having been reweighed, was left out, but delivery order was not withdrawn or canceled. It was afterwards reweighed, invoiced and paid for, and second delivery order, similar to the first, was given and not marked duplicate, neither party perhaps recollecting first order. M indorsed and hypothecated first order and borrowed money on it of O. M fails to pay O, and latter demands wool on first order of warehouse; the latter (without any notice) had properly delivered wool on second order. Has O, the pledgee, a remedy in trover, or case against N? Cite cases. G. B.

Selma, Ala.

Answer. Trover will lie against N. O must show a right of possession in himself, and a conversion of the property by N at a time when the right of possession existed in him. 4 Blackf. 317; 7 Blackf. 361; 23 Ga. 484; 31 Ill. 120; 5 Denio, 497. In trover, conversion is the gist of the action, and consists in any tortious act by which the defendant deprives the plaintiff of his property either for a time or altogether. Insurance Co. v. Cochran, 27

Ala. 228; 52 Ill. 249. To establish a conversion, it must be shown that the defendant had actual or virtual possession of the goods. 4 Blackf. 317; 6 Barb. 436. In this case the possession of the warehouseman was the possession of N. At the time N issued a second delivery order to M, he (M) had no right to the wool, having pledged it to O to secure the payment of the debt; before M could have reinvested himself with the right to resume possession of the property, he must have paid the debt or made a sufficient tender. 34 Ill. 508; 2 Blackf. 465. A demand and refusal, or an actual conversion, are necessary to sustain an action of trover. Garvin v. Luttrell, 10 Humph. (Tenn.) 16; 10 Ind. 375; 32 Barb. 396; 42 Ill. 34. The delivery of the first warehouse order to M constituted a valid sale, so far as third parties were concerned. See 65 Ill. 197; 68 Ill. 333. Under the facts in this case it would perhaps be well to join counts of case and trover in bringing the action, and this course is allowed. See 1 Chitty on Pleading, 181; Wilkinson v. Moselly, 30 Ala. 562.

Mobile, Ala. B. B. BOONE.

RECENT LEGAL LITERATURE.

BUMP'S FEDERAL PROCEDURE.—The Title Judiciary in the Revised Statutes of the United States, and the Rules Promulgated by the Supreme Court, and Forms. Together with Notes referring to all Decisions reported to January 1, 1881. By Orlando F. Bump, author of "Law and Practice in Bankruptcy," "Law of Patents," Fraudulent Conveyancing," etc. Baltimore, 1881: Cushings & Bailey.

This title page gives a very fair idea of the contents of this work and of the method followed in its preparation. While we do not approve of the plan pursued, we must concede the faithful performance of the author's duty in accordance with it. Mr. Bump has collected, arranged and cited in the form of notes to the appropriate sections of the statute no less than 6,500 cases, and we are inclined to think that his citations are unusually apt and accurate.

We consider the plan of preparing a law book, purporting to treat any topic exhaustively by selecting a portion of the statutes, and appending to the appropriate sections short notes containing citations of cases in point, radically defective. And we think Mr. Bump's book obnoxious to this objection notwithstanding the attempt made in the preface to disarm criticism by disclaiming any pretense that the work is a treatise. It is there stated: "The present work is an attempt to put the statutes and notes to the decisions in a compact, convenient and accessible form. It is not a treatise, nor anything like a treatise on Federal practice. It is designed rather as a handbook of reference for attorneys in active practice, than as a treatise to explain the principles of practice to those who are not familiar with them." It is only fair, then, to consider the work as "a book of reference for attorneys in active practice." In this view we believe the method defective, if the work pretends to be exhaustive, because so much space is necessarily given up in such a work to reprinting sections of the statute which are perfectly plain, and about which but little, if any, litigation has ever arisen, while, as a consequence, other more important and difficult matters, abounding in knotty questions, and garnished with multitudinous and contradictory adjudications, are crowded into insufficient space; and instead of having our difficulties cleared up and the correct rule pointed out, as elucidated by the judges, we are plunged into a mass of brief, chaotic notes, thrown together with but little system and precision, from which it is frequently difficult and sometimes impossible to tell whether or not a case is in point. The "attorney in active practice" rarely finds it any practical advantage to have those sections of the statutes, about which there have been no or very few adjudications, reprinted into its pages of a text-book, whenthey are perfectly accessible to him in his copy of the Revised Statutes. And those sections, about which difficulties do arise, are better treated in the form of a treatise, than by the irregular and unsystematic method of notes. Further, many questions connected with such a subject arise, the determining principles of which can not be referred to any particular section of the statute, and, consequently, many interesting adjudications upon such questions are necessarily left out of the book altogether, or are lugged into the notes under a section treating of matters not strictly cognate to them.

NOTES.

——Mr. Hunt's toast at the Ohio bar dinner.—To Our Clients: In the hours of our ardent desire to impart to others that deep knowledge of the law for which our years of student life and later experience so eminently qualify us, our client is there to listen and believe. In our hours of despondency and sorrow over untoward judgments and adverse verdicts, our client is there to receive our execrations, because his proofs did not support his statements. In our hours of victory, when our hearts swell with the memory of our successes in verdict and judgment, lo, our client is there to wring our hand in congratulation and admiration—and pay our fee. And in our festivities, when the good things of this life, in meat and drink, are before us, and the bowl goes round and beauty smiles upon us, and we glow over the thought that our bank accounts are ample, and our communications with our clients have driven want forever from our doors, what can be more fitting—more delicately and more beautifully appropriate—than that our clients should be remembered and toasted?